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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

ERVIN GRANT BRANSON, JR.,

Defendant and Appellant.

C067532

(Super. Ct. No.
CM032486)

Defendant Ervin Grant Branson, Jr., entered a negotiated no contest plea to furnishing marijuana to a 14-year-old girl (Health & Saf. Code, § 11361, subd. (b)) and misdemeanor molesting or annoying the same girl (Pen. Code, § 647.6, subd. (a)(1)). He also admitted a prior strike, arising from a 1989 robbery conviction.

Defendant now appeals, claiming the trial court abused its discretion by denying his *Romero* motion to dismiss his prior

serious felony conviction allegation.¹ We disagree and shall affirm the judgment.

DISCUSSION

Prior to sentencing, defendant asked the court to consider striking the allegation he suffered a 1989 strike conviction, based on the age of the conviction, his youth at the time of that conviction, and the nonviolent nature of the current crime.

The court examined the relevant law, the parties' briefs, and defendant's records, including the probation report. Counsel submitted without oral argument. After weighing the relevant factors, the court denied the motion, stating that based on "defendant's lengthy criminal record and many parole violations, I do not see the age of the strike prior as a factor favorable to the defendant."

We see no abuse of discretion.

Penal Code section 1385 gives the trial court authority, on its own motion or upon application of the prosecution, "and in furtherance of justice," to order an action dismissed. (§ 1385, subd. (a).) In *Romero*, the California Supreme Court held a trial court may utilize section 1385 to strike or vacate a prior strike for purposes of sentencing under the "three strikes" law, "subject, however, to strict compliance with the provisions of section 1385 and to review for abuse of discretion." (*Romero*, *supra*, 13 Cal.4th at p. 504.)

¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

"[A] court's failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) Under this standard, the defendant bears the burden of establishing an abuse of discretion. In the absence of such a showing, the trial court is presumed to have acted correctly. The appellate court may not substitute its judgment for that of the trial court when determining whether the trial court's decision to strike the prior conviction was proper. (*Id.* at pp. 376-377.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to Penal Code section 1385[, subdivision](a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*Carmony*, at p. 377.) "[W]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Id.* at p. 378.)

Here, before denying the *Romero* motion, the court stated it had considered the probation report, which sets forth at some length the particulars of defendant's background, character, and prospects, including his family background, marital status, personal history, education, and employment history. The 14-year-old victim reported that, over a two-week period, defendant (whom she called "Uncle") gave her marijuana, kissed her, touched her buttocks under her clothes, and digitally penetrated her. Photos of the victim in her underwear were found on defendant's cell phone, and he sent her a text message referring to condoms. In contrast, defendant's written statement omits any reference to facts underlying the molestation conviction; he states he only smoked marijuana with the victim because she brought it to his home.² Defendant also noted that he opened his home to the victim as a refuge from her parents, who engineered his arrest in order to steal his marijuana.

The probation report also contains a standard criminal record summary prepared by the probation department, which identifies the crimes with which defendant has been charged, the dates and disposition of those charges, the jurisdictions in which the crimes were committed, and the dates of his nine parole violations. It shows that defendant's criminal history began with a burglary he committed in 1985 as a juvenile. It continued with convictions for robbery in 1989 (followed by four

² Defendant apparently later admitted he provided the marijuana to the victim, "which he now realizes was not a good idea."

parole violations between 1991 and 1995), misdemeanor check fraud in 1995, felony check fraud in 1996 (followed by three parole violations between 1999 and 2000), and two counts of burglary in 2002 (followed by parole violations in 2007 and 2008). More recently, defendant suffered misdemeanor convictions in 2006 and 2007 for possessing articles whose manufacturer's serial numbers had been altered.³

The trial court did not abuse its discretion in concluding defendant cannot be deemed outside the spirit of the three strikes law as to the strike, and may not be treated as though he had not previously suffered it. (Cf. *People v. Williams* (1998) 17 Cal.4th 148, 161-164 (*Williams*).) The mere age of the strike did not require the trial court to strike it, particularly where, as here, defendant did not live a legally blameless life between the strike and his commission of the present offenses. (Cf. *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) We hold the trial court's order refusing to strike defendant's strike was sound, and not an abuse of discretion. (Cf. *Williams, supra*, at pp. 158-164; *People v. DeGuzman* (1996) 49 Cal.App.4th 1049, 1054-1055; *People v. Askey* (1996) 49 Cal.App.4th 381, 389.)

Defendant argues the court lacked "any meaningful information regarding the facts underlying [his] prior

³ We assume the probation report's note that defendant was convicted in 2006 of violating Penal Code section 573e is a typographical error, and that it meant to report a conviction under Penal Code section 537e.

convictions" and parole violations, without which it could not have exercised its informed discretion concerning whether to grant his request. Therefore, its decision to deny his request "can only be considered an arbitrary abuse of discretion."

We reject defendant's suggestion that the court could not have properly exercised its discretion without a full understanding of the facts underlying each of his prior convictions and parole violations. He cites no authority for this proposition, and we are aware of none. Nor are we convinced the trial court needed to know anything more than it knew in this case in order to properly consider the "nature and circumstances of his present" and prior offenses before concluding he should not be treated as though he had not previously been convicted of a serious felony. (*Williams, supra*, 17 Cal.4th at p. 161; see *id.* at pp. 153-155 [describing the probation report considered by the trial court].)

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

BUTZ, J.